

SEP 111998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-00558

COUNSEL: [REDACTED]

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

In an application, dated 25 May 93:

1. His DD Form 214 (Release or Discharge From Active Duty), dated 28 May 93, be revoked.
2. He be restored to active duty nunc pro tunc 28 May 93 (sic). [Reinstatement to [REDACTED] Air National Guard AGR tour].
3. Restoration of his leave balance as of 28 May 93.
4. Back pay from 28 May 93.
5. Payment of medical and dental obligation incurred since 28 May 93.

In an application, dated 23 Feb 96:

1. The Officer Performance Report (OPR) rendered for the period 15 Jan 92 through 1 Dec 92 be declared void and removed from his records.
2. His corrected record be considered by a standby promotion board that convened in Mar 93.

APPLICANT CONTENDS THAT:

25 May 93: The allegations of misconduct are false and fail to state a claim of misconduct and there is no evidence of dereliction of duty. There was no Secretarial approval of his honorable discharge for misconduct nor due process pre-termination hearing on allegation of misconduct. The discharge was in retaliation for protected whistle blowing activity. He was denied an impartial decision maker because the decision maker failed to consider his evidence in exoneration, mitigation, and extenuation. The decision maker prejudged the issue of misconduct. The allegations of profession neglect were not referred to The Judge Advocate General of the Air Force (TJAG-AF) as required by service regulations. He lost severance pay in excess of \$30,000 without due process of law. The allegations

regarding financial responsibility were resolved in his favor by the Air Force Office of Special Investigation (AFOSI).

Applicant's complete submission is attached at Exhibit A.

23 Feb 96: The contested OPR refers to matters occurring outside the rating period, to wit: inquiry about creditor claims was made on 4 Dec 92, 3 days after the rating period and he was not provided with a copy of the report when he was given 24 hours to respond to it. The report was not delivered to him until 15 Mar 93, over 3 months outside the rating period. He and judge advocates of the [redacted] Army and Air National Guard (ANG) participated in a [redacted] kshop to create a Commanders Guide for Military Justice in the [redacted] ANG during the period 6-12 Dec 92, more than [redacted] side the rating period and "implementation" of military justice was to commence sometime after the completion of the Commander's Guide. Inclusion of the evaluation of his job performance as a state employee in an Air Force OPR is inappropriate. He was the staff judge advocate to the organized militia of the State of [redacted]. Inclusion of matters arising out of an incomplete Defense Investigative Service (DIS) periodic reinvestigation of security clearance eligibility is prohibited by Air Force regulations.

Applicant's complete submission is attached at Exhibit A1.

STATEMENT OF FACTS:

The applicant's Total Federal Commission Service Date (TFCS D) was 24 Jun 73.

On 16 Jun 82, a request for a conditional release was requested on the applicant for the purpose of appointment in the [redacted] ANG.

On 29 Dec 82, applicant was approved for appointment as a Judge Advocate, Staff, in the grade of captain.

On 4 Apr 83, the applicant was appointed a captain in the [redacted] ANG/Judge Advocate.

On 10 Nov 84, the applicant was promoted to the grade of major, effective, and with a date of rank (DOR) of 9 Nov 84.

Applicant's Officer Effectiveness Reports (OERs) and Officer Performance Reports (OPRs) since 1986 follows:

<u>PERIOD ENDING</u>	<u>OVERALL EVALUATION</u>
3 Apr 86	1-1-1
3 Apr 87	1-1-1
3 Apr 88	1-X-1

3 Apr 89	Meets Standards
3 Apr 90	Meets Standards
3 Apr 91	Meets Standards
* 1 Dec 92	Does Not Meet Standards (Referral Rpt)
17 Oct 93	Does Not Meet Standards (Referral Rpt)

* Contested report.

On 22 Feb 93, the applicant was notified by the Executive Support Staff Officer that he was recommending the applicant be involuntarily terminated from full-time Active Guard Reserve (AGR) duty in accordance with the provisions of ANGR 35-03, paragraph 6-5c(1). The reasons for this action were as follows:

a. He failed to timely and properly respond to allegations of personal financial irregularities which were discovered during a security reinvestigation. As a result of these allegations, his access to classified information was withdrawn on 6 Nov 92. Although he knew that his supervisors considered this situation serious, he took no action to respond to their concerns. The dilatoriness of his response and the inadequacy of his answers resulted in a breach of trust between the leadership of the Alaska ANG and him as a full-time staff judge advocate.

b. On 19 Nov 92, he had General C--- sign a leave slip for himself which he then failed to properly process. When he returned to work on 4 Jan 93, he did not file his leave completion until his supervisor inquired into this matter on 21 Jan 93. An explanation was also requested of his failure to obtain a leave authorization number and an explanation of why he delayed in closing out the leave transaction. Applicant did not provide such an explanation. He was given a letter of reprimand (LOR) for his actions pertaining to the leave incident. This misconduct further eroded the relationship that should exist between his employer and him.

On 22 Feb 93, applicant acknowledged receipt of the above letter.

On 28 May 93, the applicant was released from active duty under the provisions of ANG Regulation (ANGR) 36-05 (Misconduct) with an honorable characterization of service in the grade of major. He was credited with 15 years, 11 months, and 24 days of active federal military service.

On 22 Mar 94, the applicant was charged by the Municipality of [REDACTED] of on or about 12 Mar 94, unlawfully committing the offense of trespassing, to wit: He did willfully and unlawfully enter the office of Colonel J---- G---- and refused to leave after being verbally requested/ordered to do so, in violation of [REDACTED] Municipal Code 08.30.010 A. There is no indication the applicant was prosecuted for the above.

AIR FORCE EVALUATION:

On 10 Dec 96, the Deputy Director, Personnel, ANG/MPPUR, provided an advisory opinion for the Board's review. However, the Air Force Board for Correction of Military Records' (AFBCMR) staff noted inaccuracies in the opinion and returned the application for clarification (Exhibit C).

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel for the applicant reviewed the Air Force evaluation and provided an 8-page rebuttal letter disagreeing with the advisory opinion (see Exhibit E).

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Utilization, ANG/MPPU, reviewed this application and recommends denial of relief.

In the May 93 application, with respect to the applicant's request for restoration or reinstatement in a full-time National Guard duty capacity as an AGR in the ANG, they note that the Board has no jurisdiction to grant the relief requested. The AFBCMR is limited to making a non-binding recommendation of reinstatement to the state, but there is no reason to do so here. Before a member can be reinstated as an AGR, they must first be reinstated in the ANG. The Board may not order the reinstatement of a member into an AGR position in a State ANG Unit. That power is reserved exclusively for The Adjutant General (TAG) who is the final authority for determining whether individuals in the AGR program will be separated or retained, ANGR 35-03 (now ANG Instruction 36-101), paragraph 6-ld. Here, the TAG concurred with the recommendations of the commanding officer to process the applicant for involuntary separation. Indeed, it was the TAG who prepared the OPR, which documented some of the adverse events prompting the applicant's release from the AGR tour. Given the facts that the TAG does not believe the OPR to be in error, it appears highly unlikely that the TAG would reinstate the applicant. Accordingly, the applicant's removal from the AGR position is consistent with ANG regulations. His reference to "fruit of the poisonous tree" is misapplied. That legal doctrine is employed in the criminal law arena. The legal doctrine holds that evidence that is "tainted," i.e., illegally obtained through or derived from use of illegal measures, cannot be considered in a criminal court proceeding. The applicant was not charged with criminal offenses. He was administratively separated for misconduct. He refers to an [REDACTED] state court decision, which stated the applicant should have been provided a termination hearing as a state employee notwithstanding the terms of ANGR 35-03. The Board should be informed that case was appealed and

the Air Force Litigation Division informed MPPU that the [REDACTED] a state appeals court overturned the case.

MPPU firmly believes the applicant was not wrongfully separated from the AGR position. Termination from the AGR program is strictly a state ANG headquarters procedure, governed by the provisions of ANGR 35-03. The record shows that the [REDACTED] ANG Headquarters complied with the applicable policies and procedures in ANGR 35-03 when it processed the applicant for involuntary separation. The [REDACTED] ANG Headquarters informed the applicant of the proposed recommendation to the TAG and gave him the requisite opportunity to respond and rebut the allegations contained in the recommendation. Nevertheless, the applicant contended in the application and in the lower state court hearing that he was entitled to a pretermination hearing on the allegations of misconduct. MPPU disagrees. ANGR 35-03 does not require that a hearing be held prior to involuntary separation. The applicant wrongfully relies upon a state court decision that was overturned on appeal. Consequently, his contention is unfounded. Furthermore, he was not wrongfully discharged from the [REDACTED] ANG. ANGR 35-03 requires members who are separated for cause, such as the applicant, be considered for discharge processing from the ANG utilizing the criteria outlined in ANGR 36-014. Evidence supplied by the State of Alaska shows an Efficiency Board (EB) under ANGR 36-014 was convened in Jul 94, which specifically considered the allegations of misconduct in addition to the other allegations against the applicant. The EBs findings were approved by the PACAF Commander and forwarded to the Secretary of the Air Force for final decision. On 19 Apr 96, the Secretary directed the applicant be discharged from all appointments held in the ANG and Reserve of the Air Force and that he receive a general discharge under honorable conditions as of 23 Apr 96. The National Guard Bureau (NGB) discharge order, Special Order #AW-6, dated 24 Apr 96, clearly shows the effective date of the applicant's discharge was 23 Apr 96.

With respect to the applicant's request that his DD Form 214 be revoked, MPPU recommends denial. While his DD Form 214 separating him from active duty references AFR 36-05, instead of ANGR 35-03, the proper separation authority, this error is harmless in that the procedures from ANGR 35-03 were followed and the applicant was correctly separated from active duty on 28 May 93. Consequently, this error simply requires that the form be corrected not revoked.

Regarding his request for back pay dating back to 28 May 93, no AGR pay is justified. However, this does not resolve the issue of whether any M-day back pay is justified. Unless the applicant was denied drills and active training (AT) pursuant to regulatory authority, he should have been allowed to perform drills and AT and been paid for that service. However, if he was rightfully denied drills and AT, he is not owed anything. In any event, it is the ultimate responsibility of the Board and Defense Finance and Accounting Service (DFAS) to determine what payments, if any,

the applicant is entitled to, consistent with the general policy that paid service should reflect actual performance of duty.

In the Feb 96 application, the AFBCMR lacks jurisdiction to hear the applicant's application regarding the 1 Dec 92 OPR. He admits **in** the rebuttal that he did not exhaust the administrative remedies as to correction of the OPR pursuant to AFI 36-2401. In an ANG/MPPU memorandum, dated 17 Jun 96, the inquiry was made as to whether an appeal to the OPR had been filed and whether it had been completed in accordance with AFI 36-2401 and AFI 36-2607, paragraph 2. This fundamental question had to be answered and addressed if the Board is to even consider his application. At that time, the file lacked any information as to an OPR appeal being filed or processed. MPPU had earlier checked with various offices but they could not find any evidence concerning an OPR appeal filed by the applicant or acted upon by appeal authorities. In the applicant's rebuttal comments, he acknowledges that he did not file an appeal to the OPR. Therefore, he must concede the AFBCMR does not have jurisdiction over his case regarding the 1 Dec 92 OPR and his request for removal of the contested report should be denied. His contention that the OPR refers to matters that occurred outside the rating period is unsupported. Evidence supplied by the State of Alaska shows that inquiries into the applicant's creditor's claims occurred well within the rating period and that the conference on the state military justice system, although occurring after the rating period closed, was not the basis for the adverse rating in this area.

The applicant's request that the record be considered by a standby promotion board is contingent upon a finding that a correction is warranted. This request should likewise be denied since the Board lacks jurisdiction to hear the appeal concerning the OPR and thus, is unable to fashion a correction. Since no correction is being recommended, no standby promotion board is called for.

A complete copy of the Air Force evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Counsel provided a 16-page response, with attachments (see Exhibit H) .

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed,

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After thoroughly reviewing applicant's numerous contentions **in** both applications, to include the letters of support, a majority of the Board does not find these assertions, in and by themselves, sufficiently compelling to recommend granting the relief sought. In coming to this conclusion, the Board majority is keenly aware of its somewhat limited jurisdiction in cases involving members of the Air National Guard (ANG); specifically, the Board lacks the authority to reinstate an individual to a Guard position, as requested by the applicant. Therefore, a majority of the Board agrees with the recommendation of the Air Force on this issue and adopts the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice.

4. With respect to the OPR issue, we are not convinced that the Board lacks jurisdiction to act on this portion of applicant's request, as promulgated by the Air Force. However, since we find no compelling basis upon which to remove the contested report, this issue is moot.

5. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

A majority of the panel finds insufficient evidence of error or injustice and recommends the application be denied.

The following members of the Board considered this application in Executive Session on 14 July 1998, under the provisions of Air Force Instruction 36-2603:

Ms. Patricia J. Zarodkiewicz, Panel Chair
 Mr. Loren S. Perlstein, Member
 Mr. Dana J. Gilmour, Member
 Mrs. Joyce Earley, Examiner (without vote)

By a majority vote, the Board recommended denial of the entire application. Mr. Gilmour voted to grant applicant's request to be restored to his active Guard position, to be allowed to take terminal leave, to be allowed to retire at the conclusion of terminal leave, and, to be issued a new DD Form 214, but does not

minority report. The following documentary evidence was considered:

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 25 May 93, w/atchs.
- Exhibit A1. DD Form 149, dated 23 Feb 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, ANG/MPPU, dated 10 Dec 96.
- Exhibit D. Letter, AFBCMR, dated 13 Jan 97.
- Exhibit E. Letter fr counsel, dated 12 Feb 97, w/atchs.
- Exhibit F. Letter, ANG/MPPU, dated 7 Oct 97.
- Exhibit G. Letter, AFBCMR, dated 29 Dec 97.
- Exhibit H. Letter fr counsel, dated 27 Apr 98, w/atchs.


PATRICIA J. ZARODKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

SEP 11 1998

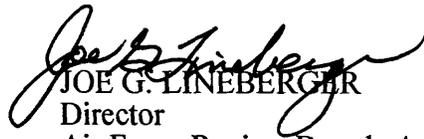
Office of the Assistant Secretary

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, AIR FORCE BOARD
FOR CORRECTION OF MILITARY RECORDS
(AFBCMR)

SUBJECT: AFBCMR Application of [REDACTED]
Docket Number 96-00558

I have carefully reviewed the evidence of record and the recommendation of the Board members. A majority found that applicant had not provided sufficient evidence of error or injustice and recommended the case be denied. I concur with that finding and their conclusion that relief is not warranted. Accordingly, I accept their recommendation that the application be denied.

Please advise the applicant accordingly.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency